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No. 63539-5-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KEVIN RANDALL PERRIN and CINDY PERRIN,
husband and wife, and the marital community thereof,

Appellants,

vs.

JEFF STENSLAND and JANE DOE STENSLAND,
husband and wife, and the marital community thereof,

Defendants,

HATTIE VAN WEERDUIZEN, wife, and DALE VAN WEERDUIZEN,
Personal Representative of the Estate of Gordon Van Weerduizen,

Respondents.

APPEAL FROM THE SUPERIOR COURT
FOR WHATCOM COUNTY
THE HONORABLE CHARLES SNYDER

BRIEF OF APPELLANTS

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I. INTRODUCTION

An action is timely commenced if it is filed and one or more defendants are served within the applicable statute of limitations. If, unbeknownst to the plaintiff, one of the named defendants has died before he has been served, the defendant's estate may be substituted as a defendant after the statute of limitations has run if the estate has actual or imputed notice of the timely claim and can establish no prejudice. Under CR 15(c), the amended complaint relates back to the date the original complaint was filed.

Here, although the complaint was timely filed, two of the defendants, including the decedent's widow, were timely served, and the decedent's liability insurer had timely notice of the lawsuit, the trial court held that the amended complaint substituting the decedent's estate did not relate back under CR 15(c) because the plaintiffs should have known three weeks before the statute of limitations expired that the defendant had died, and were therefore guilty of "inexcusable neglect." The trial court disregarded the plain language of CR 15(c), its remedial purpose, and the case law applying relation back in these precise circumstances. This court should reverse and remand for trial.

II. ASSIGNMENTS OF ERROR

The trial court erred in entering its Order Granting Dale Van Weerduizen of The Estate of Gordon Van Weerduizen and Hattie Van Weerduizen's Motion to Dismiss. (CP 21-22) (Appendix A)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Is an action timely commenced where the plaintiffs file their complaint and serve two of the three named defendants before expiration of the statute of limitations?

2. Did the trial court err in holding that the plaintiffs' amended complaint substituting the defendant's Estate for the deceased defendant driver did not relate back to the date the original complaint was filed under CR 15(c), where the plaintiffs timely served the defendant's spouse, the defendant's liability insurer had timely notice of the claim and arranged for defense counsel to appear for both the spouse and the Estate, the Estate was not opened until the day the statute of limitations expired, and neither the Estate nor the defendant suffered any prejudice as a result of the delay?

IV. STATEMENT OF CASE

A. The Perrins Commenced This Action Against The Van Weerduizens And Served Ms. Van Weerduizen Shortly Before The Three Year Statute Of Limitations Expired Without Knowing That Mr. Van Weerduizen Had Died.

This action arises from an auto accident in Whatcom County on August 15, 2003. Plaintiff Kevin Perrin was a passenger in a car that was driven by defendant Jeff Stensland. Gordon Van Weerduizen, while driving his car at an excessive speed and in an unsafe manner, caused a collision with Stensland's car. Mr. Perrin was injured in the accident. (CP 29, 81-82)

Mr. Perrin contacted counsel who prepared a Summons and Complaint naming both Mr. Stensland, and Mr. Van Weerduizen, along with their spouses and their marital communities, as defendants. (CP 29) Mr. and Mrs. Perrin filed their Complaint for Personal Injuries in Whatcom County Superior Court on July 3, 2006. (CP 80) Unbeknownst to the Perrins or their counsel, Mr. Van Weerduizen had died some three and one-half months earlier, on March 20, 2006. (CP 29-30)

The Stenslands were served with the Perrins' complaint at their home on July 14, 2006. (CP 29) Hattie Van Weerduizen, Gordon's spouse, was served at the Van Weerduizens' home in

Sumas on or about July 24, 2006. The process server's declaration of service designated Ms. Van Weerduizen "Spouse/Widow," an appellation that went unnoticed by the Perrins' counsel. (CP 29-30)

On August 11, 2006, the Seattle law firm of Davis Rothwell served the Perrins' counsel with a "Notice of Appearance of Hattie Van Weerduizen." (CP 30) Neither the declaration of service, nor Ms. Van Weerduizen's counsel's notice of appearance is in the court file. However, the trial court had a copy of the declaration of service, which it read into the record at the hearing on the motion to dismiss (RP 24), and expressly considered the document in entering summary judgment. (CP 222 (listing "proof of service on Hattie Van Weerduizen"))

On August 15, 2006, exactly three years following the collision, Mr. Van Weerduizen's son Dale Van Weerduizen was appointed personal representative of his late father's estate, filing a Notice to Creditors in a newly opened Whatcom County Superior Court probate. (CP 39) There is no evidence that Dale Van Weerduizen, his mother Hattie, or their counsel informed the Perrins or their lawyer that an estate had been opened or a personal representative appointed at that time.

The Perrins' counsel diligently prosecuted this lawsuit, serving written discovery directed to Hattie and Gordon Van Weerduizen on Hattie's counsel on August 30, 2006. (CP 30, 34) On September 26, 2006, Hattie Van Weerduizen responded to interrogatories, identifying herself in response to a request for background information as a "Widow as of March 20, 2006." (CP 30, 36) The Perrins' counsel did not immediately notice this information. (CP 30)

The Perrins and their lawyer did not learn that Gordon Van Weerduizen had died and that his son Dale had been appointed personal representative of his estate until December 20, 2006, when the estate's probate lawyer served Mr. Perrin and his counsel the Notice to Creditors that had been filed four months earlier. (CP 30-31, 38-40) Through his lawyer, Mr. Perrin filed a creditor's claim in the Gordon Van Weerduizen estate on January 18, 2007. (CP 31, 42, 44) The personal representative rejected Mr. Perrin's creditor claim on January 23, 2007. (CP 46)

B. The Trial Court Held That The Perrins' Amended Complaint Against The Estate Was Untimely And Did Not Relate Back To The Date The Original Complaint Was Filed.

Mr. Perrin filed an Amended Summons and Amended Complaint, naming Dale Van Weerduizen as Personal Representative of the Estate of Gordon Van Weerduizen on February 1, 2007. (CP 72-77) Dale Van Weerduizen was personally served in Sumas on February 15, 2007. (CP 31) The Davis Rothwell firm – the same firm that appeared on behalf of Hattie Van Weerduizen – filed its Notice of Appearance on behalf of Dale, as Personal Representative, on March 9, 2007. (CP 68-69) The Davis Rothwell firm continued to defend the Estate under the Van Weerduizen liability policy. (CP 32, 48)

Without answering the amended complaint, on April 16, 2007, the Personal Representative and Hattie moved to dismiss Mr. Perrin's lawsuit under CR 12(b)(6), on statute of limitations grounds. The Estate argued that the lawsuit against the PR was not commenced until more than three years after the August 15, 2003 collision, and that the timely service on Hattie could not establish liability against a marital community that ceased to exist upon Mr. Van Weerduizen's death in March 2006. (CP 60-61)

The Honorable Charles Snyder (“the trial court”) granted the motion and dismissed the action against the Van Weerduizen estate and Hattie on June 1, 2007. (CP 21-22) In its oral decision, the trial court gave two alternative reasons for dismissal: The trial court held that the Perrins had no right to “add an additional party after the statute of limitations has run,” and that if CR 15(c) applied, the Perrins were guilty of inexcusable neglect because they had sufficient time before the statute of limitations ran to “come before the court and ask for the right to amend or to serve the estate.”

[I]t’s clear from the material in the files that the plaintiff would have been aware and should have been aware, in fact, actually was aware of the death of Mr. Van Weerduizen, that is -- in sufficient time to have made the necessary change to the complaint and come before the court and ask for the right to amend or to serve the estate.

...

But beyond that, I think the court has to look at the *Young* case. It is a state supreme court case and I think it pretty clearly addresses the same sort of circumstances here. I don’t believe that you can add an additional party after the statute of limitations has run, and that’s what we have here. That’s the *Young* case in that regard. It’s not a matter of -- because if it doesn’t relate back, you can’t do it, and I don’t think the relating back applies under CR 15.

(RP 24-25)

The trial court's June 1, 2007 Order dismissing the Estate became a final judgment on April 24, 2009, when the trial court dismissed the Perrins' remaining claim against Mr. Stensland. (CP 19-20) The Perrins timely appealed. (CP 5, 11)¹

V. SUMMARY OF ARGUMENT

This lawsuit was timely commenced by service and filing before the statute of limitations had run. The only question before the trial court was whether the amended complaint related back to the date of the original complaint – an issue that the trial court analyzed using an incorrect legal standard.

The amended complaint did not add an additional defendant, but substituted the personal representative of the estate for the deceased defendant who had already been named. Because the Van Weerduizen's liability insurer and the defense lawyers whom the insurer hired had notice and were defending the claim before the statute of limitations had run, the Estate had imputed notice of the timely action. Moreover, the Estate cited no prejudice in having

¹ While the notice of appeal lists the Order Granting Defendant Jeff Stensland's Motion for Summary Judgment as the final judgment entered in this action (CP 11), the Perrins' appeal is limited to the dismissal of their claims against the Van Weerduizen Estate.

to defend the claim on the merits and none exists as a matter of law.

The trial court erroneously held that the Perrins' failure to immediately perfect a lawsuit against the Estate was "inexcusable neglect" that absolutely bars this action. The requirement of proving excusable neglect applies only when a new previously unidentified defendant is added in an amended complaint. It does not apply where as here, an estate substitutes for a deceased, but previously named, defendant. Even if excusable neglect has some relevance, the trial court erred as a matter of law in treating the Perrins' delay in serving the Estate an absolute bar. This court should reverse and remand for trial.

VI. ARGUMENT

A. Standard of Review: This Court Reviews De Novo The Trial Court's Summary Judgment of Dismissal And Its Interpretation Of CR 15, And Reviews The Trial Court's Application Of CR 15 For Abuse of Discretion Only If the Trial Court's Legal Analysis Was Correct.

Under CR 12(b), the Estate's motion to dismiss for failure to state a claim was converted to a motion for summary judgment under CR 56 because the trial court considered "matters outside the pleadings" – the Perrins' attorney's declaration and attached documents. CR 12(b) This court reviews the trial court's decision

on summary judgment de novo, granting all favorable inferences from the evidence before the trial court to the non-prevailing party. **Potter v. Wash. State Patrol**, 165 Wn.2d 67, 78, ¶¶13, 196 P.3d 691 (2008).

This court also reviews de novo the trial court's interpretation of a court rule as a question of law. **Biomed Comm, Inc. v. State Dept. of Health Bd. of Pharmacy**, 146 Wn. App. 929, 934, ¶ 10, 193 P.3d 1093 (2008). CR 15(c), the rule at issue in this case, "is to be liberally construed on the side of allowance of relation back of the amendment where the opposing party will be put to no disadvantage." **Craig v. Ludy**, 95 Wn. App. 715, 718, 976 P.2d 1248 (1999), *rev. denied*, 139 Wn.2d 1016 (2000), *quoting Lind v. Frick*, 15 Wn. App. 614, 617, 550 P.2d 709 (1976).

While appellate courts reviewing a trial court's decision under CR 15(c) frequently state that the decision is reviewed for abuse of discretion, the trial court necessarily abuses its discretion where it misinterprets the rule, or fails to apply it correctly in light of its purpose and the caselaw. **Stansfield v. Douglas County**, 107 Wn. App. 20, 33, 26 P.3d 935 (2001) (reversing ruling "that the amendments did not relate back to the date of the original

complaint because the superior court misapprehended the case law and abused its discretion.”), *aff'd* 146 Wn.2d 116, 43 P.3d 498 (2002); ***Nepstad v. Beasley***, 77 Wn. App. 459, 468-69, 892 P.2d 110 (1995) (trial court “exercised his discretion on untenable grounds . . . [because he] misapprehended the caselaw” in refusing to allow amendment to relate back). *See also*, ***Biggs v. Vail***, 124 Wn.2d 193, 197, 876 P.2d 448 (1994) (in determining whether trial court abused discretion in applying CR 11 “we must keep in mind [the] purpose” of the rule); ***Leda v. Whisnand***, 150 Wn. App. 69, 79 n.2, 207 P.3d 468 (2009) (“A trial court necessarily abuses its discretion if its ruling is based on an erroneous view of the law.”).

Here, the trial court erroneously interpreted the language of CR 15(c), and ignored the liberal policy behind CR 15(c). Regardless of the standard of review, its erroneous application of CR 15(c) mandates reversal.

B. As The Original Complaint Was Timely Served And Filed, CR 15(c) Applies To Determine Whether The Amendment Substituting The Estate Relates Back To The Date of Original Filing.

This action was timely commenced because the Perrins both filed and served their original complaint upon two of the named defendants within the three-year statute of limitations. Where a

complaint is timely filed, timely service of process on one of several named defendants is effective to perfect the action for purposes of the statute of limitations and tolls the statute as to all unserved defendants. ***Sidis v. Brodie/Dohrmann, Inc.***, 117 Wn.2d 325, 329, 815 P.2d 781 (1991).

Because this action was timely commenced, the trial court's reliance on ***Young v. Estate of Snell***, 134 Wn.2d 267, 948 P.2d 1291 (1997) to hold that the statute of limitations had run on the claim against the Estate was misplaced. (RP 25) In ***Young***, the plaintiff, who was injured in an auto accident, filed a complaint naming the defendant ten days before expiration of the statute of limitations, not knowing that the defendant had died of unrelated causes. 134 Wn.2d at 270. The plaintiff did not serve his complaint. Six months after the statute of limitations expired, the plaintiff arranged for appointment of a personal representative, filed an amended complaint naming the defendant driver's estate, and served the newly appointed PR. 134 Wn.2d at 270-71. The Supreme Court affirmed the dismissal of the action because neither the original nor the amended complaint was served within 90 days after the original complaint was filed pursuant to RCW 4.16.170,

and therefore the lawsuit was not timely commenced. The Court held that the three year statute of limitations for personal injury actions, RCW 4.16.080(2), barred the action against the decedent's estate, where no party was served within 90 days of filing and after the statute had expired. 134 Wn.2d at 281 & n.7. *Accord*, ***Banzeruk v. Estate of Howitz***, 132 Wn. App. 942, 135 P.3d 512 (2006) (affirming dismissal of action where neither original nor amended complaint substituting estate for deceased defendant was served within 90 days of filing original complaint after statute of limitations expired), *rev. denied*, 159 Wn.2d 1016 (2007).

In contrast to ***Young*** and ***Banzeruk***, here, the original complaint was both timely filed *and* timely served against two of the named defendants – Jeff Stensland and Hattie Van Weerduizen. The lawsuit was timely commenced as it was filed on July 3, 2006, less than three years after the August 15, 2003 accident (CP 80), Stensland was served on July 14, 2006, (CP 29), and Hattie Van Weerduizen was served on July 24, 2006. (CP 29-30) In contrast to ***Young***, this action was indisputably timely commenced as to some of the named defendants. See ***Sidis***, 117 Wn.2d at 330-31 (where complaint was timely filed and timely served as to one of

several named defendants, service of process on one defendant tolled statute of limitations as to all unserved defendants).

The trial court erroneously held that a plaintiff cannot “add an additional party after the statute of limitations has run.” (RP 25) The trial court’s reliance on *Young* was error. Because this action was timely commenced against some of the defendants, the proper question was whether the amendment substituting the Estate for the deceased Dale Van Weerduizen related back to the date of the original filing under CR 15(c) because the estate had “notice of the institution of the action,” and was not “prejudiced in maintaining a defense on the merits.”

(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

CR 15(c).²

“New parties can be added under the second sentence of CR 15(c) after the statute of limitations has run.” **Stansfield v. Douglas County**, 146 Wn.2d 116, 122, 43 P.3d 498 (2002). In particular, new parties may be *substituted* under the criteria of CR 15(c) after expiration of the statute of limitations. **Beal for Martinez v. City of Seattle**, 134 Wn.2d 769, 780-81, 954 P.2d 237 (1998). Where, as here, the plaintiff “files and served the complaint . . . within the three-year limitations period . . . [t]he only issue is whether the [plaintiffs] were entitled to amend their complaint to substitute [defendant’s] estate as the defendant” and whether the complaint relates back to the date of the original complaint under CR 15(c)’s standards of notice and lack of prejudice. **Craig v. Ludy**, 95 Wn. App. 715, 718, 976 P.2d 1248 (1999). As discussed in the subsequent section, the trial court erred in holding that they failed to do so, and its order of dismissal should be reversed.

² Because the served defendants had not answered the original complaint, the Perrins had an absolute right to file their amended complaint under CR 15(a) (“a party may amend the party’s pleading once as a matter of course at any time before a responsive pleading is served . . .”). The Estate has not argued that the Perrins were required to seek leave of court to amend their complaint under CR 15(a).

C. The Perrins' Amended Complaint Substituting The Estate For Dale Van Weerduizen Related Back To The Date Of The Original Complaint Under CR 15(c).

The Perrins' Amended Complaint substituting the Estate for Dale Van Weerduizen satisfied CR 15(c)'s requirements. The Estate had imputed notice of the Perrins' lawsuit through the Van Weerduizen's liability insurer, who had timely actual notice of the claim and could not establish prejudice by reason of the amendment. Because the Perrins established that the Estate had timely notice and was not prejudiced by the substitution, the trial court erred in holding that the Perrins' "inexcusable neglect" barred relation back under CR 15(c). Even if that "neglect" was relevant, the trial court erred in holding that the Perrins' failure to perfect a lawsuit against the Estate, which had not even been opened until the day upon which the three-year statute of limitations expired, constituted an absolute bar to this action.

1. The Van Weerduizen Estate, Through Its Liability Insurer, Had Notice Of The Claim Within The Limitations Period, And Could Not Establish Prejudice In Having To Defend the Perrins' Claim On The Merits.

The Perrins' Amended Complaint satisfied the requirements of CR 15(c) because the Estate, through the Van Weerduizen's insurer, had timely notice of the Perrins' claim before the statute of

limitations ran and could not establish any prejudice in having to defend against the Amended Complaint. It is undisputed that the Amended Complaint “arose out of the conduct, transaction, or occurrence set forth . . . in the original pleading,” and therefore satisfied the first sentence of CR 15(c), as both complaints sought the same damages for the same legal wrong – Mr. Van Weerduizen’s negligent operation of his motor vehicle. See **Nepstad v. Beasley**, 77 Wn. App. 459, 464, 892 P.2d 110 (1995) (“The first condition is indisputably satisfied because the original complaint and the amendment both relate to the same automobile accident.”).

The Amended Complaint also satisfied the requirements of the second sentence of CR 15(c):

[T]his rule allows a plaintiff to change the party against whom he or she is asserting a claim, after the statute of limitations has expired, so long as . . . the party being added had notice and knowledge of the claim, and that party will not be [be] prejudiced in maintaining his or her defense.

LaRue v. Harris, 128 Wn. App. 460, 465, 115 P.3d 1077 (2005).

Because the Perrins’ timely served Hattie Van Weerduizen, and because the Van Weerduizen’s liability insurer arranged for defense counsel to appear prior to the expiration of the statute of

limitations, the Perrins established both knowledge of the claim and lack of prejudice as a matter of law.

Washington courts hold that timely notice may be imputed to the defendant brought in by an amended complaint “if there is a community of interest between the originally named defendant and the party to be added.” ***Craig v. Ludy***, 95 Wn. App. 715, 719, 976 P.2d 1248 (1999). In ***Craig***, as in this case, the plaintiff filed a complaint for injuries from an auto accident within the three year statute of limitations. The defendant had moved to North Carolina, where he died of causes unrelated to the accident before the complaint was filed. Unaware of the defendant’s death, the plaintiff served the Secretary of State under the nonresident motorist statute shortly before the three-year statute expired. 95 Wn. App. at 717. After learning of the defendant’s death, the plaintiff sought to amend the complaint to substitute the defendant’s estate after the statute had run. The trial court dismissed the action, “holding the amendment would not relate back to the date the complaint was filed.” 95 Wn. App. at 717.

The Court of Appeals reversed, holding that “notice may be imputed if there is a community of interest between the originally

named defendant and the party to be added.” 95 Wn. App. at 719. Although “the record [did] not indicate when the estate became aware of the action,” the defendant’s “insurer certainly had notice of this action. Presumably counsel retained by the insurer to represent its insured would be required to defend the suit regardless of whether Mr. Ludy were alive or dead.” 95 Wn. App. at 719-20.

Similarly, in ***Schwartz v. Douglas***, 98 Wn. App. 836, 991 P.2d 665, *rev. denied*, 141 Wn.2d 1003 (2000), the injured plaintiff’s original complaint was served on the defendant driver’s spouse within the three-year limitations period, but before the plaintiff learned of the defendant’s unrelated death. 98 Wn. App. at 837. The plaintiff also sent a copy of the complaint to the defendant’s insurer. After learning of the defendant’s death the plaintiff obtained the appointment of a special administrator for the estate, over 16 months after the statute of limitations had expired. 98 Wn. App. at 838. The Court of Appeals reversed the trial court’s dismissal on statute of limitations grounds, holding that the insurer, and thus the Estate, had imputed timely notice of the claim:

Counsel retained by the insurer would have been required to defend this suit whether for Mr. Douglas or for his estate after he died. Due to this community of interest, the notice to the insurer is imputed to the estate.

98 Wn. App. at 840.

Most recently, in ***LaRue v. Harris***, 128 Wn. App. 460, 115 P.3d 1077 (2005), Division Two held that an amended complaint substituting the Estate for the defendant in an auto accident case related back to the date the original complaint was filed because the insurer had timely notice of the claim:

Farmers had notice and knowledge since at least 1998, and because it shared a community of interest with the Estate, its notice and knowledge were imputable to the Estate. Neither Farmers nor the Estate was prejudiced in maintaining a defense because, except for substituting the Estate in place of Harris, the amended claim was the same as the original one. The requirements of CR 15(c) were met. . . .

128 Wn. App. at 465, ¶ 12.

LaRue, ***Schwartz*** and ***Craig*** control here and mandate reversal of the trial court's order of dismissal because the Estate had imputed knowledge of the original complaint that was timely served on Hattie Van Weerduizen. On August 11, 2006, prior to the expiration of the three year statute, the Van Weerduizen's insurer arranged for the law firm of Davis Rothwell to appear on

Hattie's behalf – the same defense firm that defended the Estate after the carrier determined that “Dale Van Weerduizen, as personal representative of the estate, is covered under Gordon’s policy.” (CP 30, 32, 48) Whether or not Dale Van Weerduizen himself received actual notice is therefore irrelevant because knowledge to the estate’s counsel and its insurer were sufficient to impute knowledge to the Estate under CR 15(c).

Because the Estate had timely notice, it cannot establish any prejudice in formally appearing following expiration of the statute of limitations. “The defendant must demonstrate some prejudice to defending the action *on the merits*. It is not sufficient for the defendant to simply argue that it is unfair to lose the protection of the statute of limitations grounds.” 3A Tegland, *Wash. Pract.* 328 (5th Ed. 2006) (emphasis in original), citing *LaRue*, 128 Wn. App. 460.

“[B]ut for a mistake concerning the identity of the proper party, the action would have been brought against” the Estate. CR 15(c). The Estate cannot establish any prejudice where both its counsel and its insurer had timely notice of the Perrins’ action.

2. The Trial Court Erred In Holding The Perrins To A Standard Of Excusable Neglect Under CR 15(c) Because The Amended Complaint Did Not Name An Entirely New Defendant, But Merely Substituted The Estate.

The trial court dismissed the Perrins' lawsuit because they failed to establish that their delay in filing the action against the Estate was not the result of excusable neglect. Having established that the Estate had notice and was not prejudiced, however, the Perrins established all that CR 15(c) requires. The text of CR 15(c) does not impose a requirement of "excusable neglect," and the courts have refused to impose such a requirement where, as here, the amendment does not add an entirely new party, but seeks to substitute a personal representative for a deceased defendant.

The requirement of establishing "excusable neglect" does not appear in the text of CR 15(c) and is not required under the parallel federal rule, Fed. R. Civ. P. 15(c). See **Craig**, 95 Wn. App. at 719 n.2 ("Federal authority is persuasive in interpreting language of a state court rule that parallels a federal rule."). Washington courts have, by caselaw, added a requirement of excusable neglect "only in those cases where the plaintiff seeks to join an additional defendant." **Xue v. Aramark Corp.**, 2007 WL 1232159 at *8 (W.D.

Wa. 2007);³ **Haberman v Washington Public Power Supply System**, 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1988) (excusable neglect standard applies “in cases here leave to amend to *add additional defendant[s]* has been sought.”) (emphasis added).

But where, as here, a plaintiff seeks to *substitute* one defendant for another because of a mistake in identity or capacity, there is no requirement of showing that the mistake was “excusable.” To impose this additional requirement does not comport with either the plain language of CR 15(c), or the purpose of the relation back doctrine.

The Supreme Court has held that the purpose of the relation back standard under CR 15(c) is to provide fair notice to the defendant and to “assure that statute of limitations purposes are not subverted.” **Beal for Martinez v. City of Seattle**, 134 Wn.2d 769, 780-81, 954 P.2d 237 (1998) (untimely substitution of personal representative for guardian ad litem as plaintiff relates back). Accordingly, while the standards of CR 15(c) apply to a substitution

³ Ninth Circuit Rule 36-3 allows citation of unpublished decisions issued after Jan. 1, 2007. See GR 14. A copy of Judge Bryan’s decision is attached Appendix B to this brief.

of plaintiffs, as well as defendants, requiring that a plaintiff seeking substitution on the basis of privity or succession in interest show “excusable neglect” would not further the purpose of the rule:

The same claim is involved, and the beneficiaries, if the action is successful, remain the same. The City of Seattle will not suffer any prejudice in preparing a defense if the change in capacity is allowed, nor is there any doubt that notice was had that suit would be brought against the City if the proper party sued. Thus, express requirements of CR 15(c) are satisfied.

Beal, 134 Wn.2d at 781. See also, *Kommavongsa v. Haskell*, 149 Wn.2d 288, 317, 67 P.3d 1068 (2003) (amendment substituting assignor following invalidation of assignment relates back; irrelevant “whether the wrong party filed the lawsuit out of mistake or inadvertence”); *Miller v. Campbell*, 164 Wn.2d 529, 537, ¶ 14, 192 P.3d 352 (2008) (allowing substitution of bankruptcy trustee as real party in interest after expiration of statute of limitations; “the rules do not require a showing of mistake or excusable neglect”).

Even before the Supreme Court dispensed with the requirement of “excusable neglect” in *Beal*, Division Two “question[ed] whether the ‘inexcusable neglect’ case law applies to bar relation back where a party has incorrectly identified the defendant.” *Nepstad*, 77 Wn. App. at 467. See *Craig*, 95 Wn.

App. at 719 (“The critical issue is whether Mr. Ludy’s estate had notice of the action and knew or should have known it would have been named as a defendant but for the Craigs’ mistake.”). Most recently, in *LaRue*, the court analyzed an amended complaint substituting the estate for the decedent defendant under CR 15(c) without even analyzing whether the mistake was “excusable.” 128 Wn. App. at 465-66.

This court should hold that an amendment substituting an Estate for a deceased defendant under CR 15(c) is authorized under the standards of CR 15(a), without the additional requirement that the delay was the result of excusable neglect. The trial court erred in holding the Perrins to a standard of excusable neglect under CR 15(c) in the instant case. The Perrins’ amended complaint did not add a new party. Like the change in representative capacity at issue in *Beal* and *Miller*, the amended complaint only substituted the Estate for the decedent. Requiring the Perrins in these circumstances to establish that the delay was “excusable,” where they have already established that the Estate and its insurer had timely notice and was not prejudiced by the amendment, does not further any of the purposes of CR 15(c).

3. The Trial Court's Standard For Excusable Neglect Did Not Comport With The Requirement That CR 15(c) Be Liberally Interpreted.

Even if the "excusable neglect" standard applies to the substitution of an estate for a decedent in these circumstances, the trial court's dismissal must nonetheless be reversed as an error of law. The trial court's holding that the Perrins were inexcusable in failing to learn of Dale Van Weerduizen's death, commence a probate, and amend and serve the complaint within three weeks espoused a standard of "excusable neglect" that is directly contrary to the liberal policies underlying CR 15(c).

CR 15(c) must be liberally construed to allow relation back of an amendment "where the opposing party will be put to no disadvantage. Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties." *Craig*, 95 Wn. App. at 718-19, quoting, *Lind v. Frick*, 15 Wn. App. 614, 617, 550 P.2d 709 (1976), rev. denied, 88 Wn.2d 1001 (1977); see also, *Schwartz*, 98 Wn. App. at 840. The trial court's determination that the Perrins were guilty of inexcusable neglect ignored this standard.

The Perrins cannot be faulted for waiting until one month before the three year statute expired before filing this lawsuit. A plaintiff “has the full period of the statute of limitations to decide whether to file suit at all.” *Martin v. Meier*, 111 Wn.2d 471, 480, 760 P.2d 925 (1988). Moreover, neither the Estate nor the trial court accused the Perrins of inexcusable neglect in failing to discover Mr. Van Weerduizen’s death prior to service on Hattie Van Weerduizen on July 24, 2006, a mere three weeks before the statute expired.

Instead, the trial court reasoned that upon obtaining the return of service indicating service on Mr. Van Weerduizen’s “spouse/widow,” “the plaintiff would have been aware and should have been aware, in fact, actually was aware of the death of Mr. Van Weerduizen in sufficient time to . . . have made the necessary change to the complaint and come before the court and ask for the right to amend or to serve the estate.” (RP 24) The trial court’s reasoning is faulty. There was no estate to serve, because the Van Weerduizens waited until the day the statute ran before commencing a probate. (CP 39) The Personal Representative filed a notice to creditors on August 15, but did not notify the

Perrins until December 20, 2006. (CP 39-40) The trial court would have required the Perrins, in three weeks time, to determine that there was no pending probate and obtain appointment of a personal representative, as well as file and serve the amended complaint.

While it may have been technically feasible to take all the steps necessary to timely file a lawsuit against the Estate, the Perrins' failure to do so does not bar the Perrins' action in the absence of any prejudice or lack of notice to the Estate. "[I]nexcusable neglect . . . is only one factor, not an absolute bar to amendment." *Nepstad*, 77 Wn. App. at 468. To the extent the trial court had discretion to consider the reasonableness of the Perrins' failure to perfect their claim against the Estate in three weeks time, it exercised that discretion for untenable reasons by treating their neglect as an "absolute bar." *Nepstad*, 77 Wn. App. at 468. Its error mandates reversal and reinstatement of the Perrins' lawsuit.

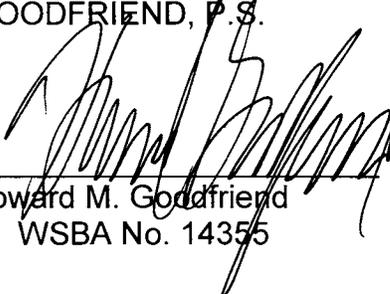
VII. CONCLUSION

This court should reverse and remand the Perrins' claim against the Van Weerduizen estate for trial.

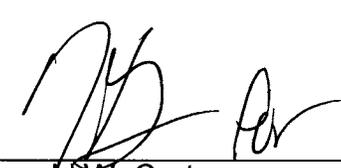
Dated this 7th day of October, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

CARTER & FULTON PS

By: 

Howard M. Goodfriend
WSBA No. 14355

By: 

Donald W. Carter
WSBA No. 5569

Attorneys for Appellants

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 8, 2009, I arranged for service of the Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Donald W. Carter Carter & Fulton PS 3731 Colby Ave. Everett, WA 98201-4910	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Marilee Erickson Reed McClure 601 Union St., Suite 1500 Seattle WA 98101-1363	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail
Patrick N. Rothwell Davis Rothwell Earle & Xochihua PC 701 Fifth Avenue, Suite 5500 Seattle, WA 98104-7096	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail

DATED at Seattle, Washington this 8th day of October, 2009.



Tara D. Friesen

FILED IN OPEN COURT
6-1 2007
WHATCOM COUNTY CLERK

By [Signature]
Deputy

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SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

KEVIN RANDALL PERRIN and CINDY)
PERRIN, husband and wife and the marital)
community thereof,)
Plaintiff,)
v.)
JEFF STENSLAND and JANE DOE)
STENSLAND, husband and wife and the marital)
community thereof,)
HATTIE VAN WEERDUIZEN Etal, and DALE)
VAN WEERDUIZEN, Personal Representative of)
the Estate of Gordon Van Weerduizen Etal, and)
the marital community thereof,)
Defendants.)

No. 06-2-01494-1

ORDER GRANTING DALE VAN WEERDUIZEN AS PERSONAL REPRESENTATIVE OF THE ESTATE OF GORDON VAN WEERDUIZEN AND HATTIE VAN WEERDUIZENS' MOTION TO DISMISS

THIS MATTER came for hearing on June 1, 2007, on Defendants Dale Van Weerduizen as Personal Representative of the Estate of Gordon Van Weerduizen and Hattie Van Weerduizens' Motion to Dismiss. The Court considered;

- (1) Defendants Van Weerduizens' Motion to Dismiss;
- (2) Plaintiffs' Opposition Brief with attached Declaration and exhibits;
- (3) Defendants Van Weerduizens' Reply Brief;

(4) Supplemental Opposition to Motion

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1 -ORDER GRANTING DEFENDANT VAN WEERDUIZENS' MOTION TO DISMISS [PROPOSED]

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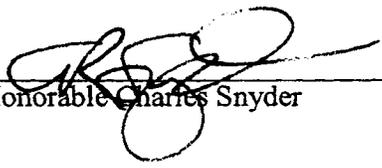
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(5) Proof of service on Hattie Van Weerduizen

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

- (1) Defendants Dale Van Weerduizen as Personal Representative of the Estate of Gordon Van Weerduizen and Hattie Van Weerduizens' Motion to Dismiss is GRANTED.
- (2) Plaintiffs' claims against defendants Dale Van Weerduizen as Personal Representative of the Estate of Gordon Van Weerduizen and Hattie Van Weerduizen are dismissed with prejudice.

DATED this 1 day of June, 2007.



 Honorable Charles Snyder

Presented by:
DAVIS ROTHWELL
EARLE & XÓCHIHUA P.C.



 Patrick N. Rothwell, WSBA No. 23878
 Attorney for defendants Dale Van Weerduizen
 as Personal Representative of the Estate of
 Gordon Van Weerduizen and Hattie
 Van Weerduizen

Copy Received
John James WSBA #24315

for attorney George J. Freeman
attorney for Plaintiffs

2 -ORDER GRANTING DEFENDANT VAN WEERDUIZENS'
MOTION TO DISMISS [PROPOSED]

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Page 1

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 (Cite as: 2007 WL 1232159 (W.D.Wash.))

Only the Westlaw citation is currently available.

United States District Court, W.D. Washington,
 at Tacoma.

Estate of Derek XUE, Jian Xiong Xue & Ming
 Feng Zhong, Plaintiffs,

v.

ARAMARK CORPORATION, a Delaware Corpora-
 tion, Defendant.

No. C06-5667RJB.

April 26, 2007.

Hyon Chun Pak, Seattle, WA, for Plaintiffs.

Charles C. Huber, Robert J. Guite, Lane Powell PC,
 Seattle, WA, for Defendant.

ORDER ON DEFENDANT ARAMARK CORP.'S
 MOTION FOR JUDGMENT ON THE PLEAD-
 INGS

ROBERT J. BRYAN, United States District Judge.

*1 This matter comes before the court on Defendant ARAMARK Corp.'s Motion for Judgment on the Pleadings. Dkt. 10. The court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

PROCEDURAL HISTORY

On Saturday, September 23, 2003, Derek Xue drowned in a swimming pool on the premises of lake Quinault Lodge, while a guest of that facility. Dkt. 10. Defendant ARAMARK Corporation contends that Lake Quinault Lodge, a vacation resort located inside the Olympic National Forest in Grays Harbor County, is operated by Aramark Sports & Entertainment Services, Inc., through a concession agreement with the U.S. Forest Service. Dkt. 12, at 3. On the Washington State Department of Revenue

State Business Records Database, ARAMARK SPORTS & ENTERTAINMENT SERVICES INC is identified as doing business as LAKE QUIN-AULT LODGE. Dkt. 17, at 5. According to Charles J. Reitmeyer, Vice President and Associate General Counsel for Risk Management, Antitrust and Litigation in the "Aramark Legal Department," ARAMARK Corporation, a Delaware Corporation that has its principal place of business in Philadelphia, Pennsylvania, is a holding company; ARAMARK Corporation is not incorporated in and does not do business in the state of Washington; Aramark Sports & Entertainment Services, Inc. is a distinct corporation from both ARAMARK Corporation and Aramark Sports and Entertainment Group; Aramark Sports & Entertainment Services, Inc. and Aramark Sports and Entertainment Group are corporate entities that are separate and distinct from each other; and Aramark Sports and Entertainment Group does not operate the Quinault Lodge. Dkt. 12, at 1-2. The parties apparently agree that Aramark Sports & Entertainment Services, Inc. is a wholly-owned subsidiary of ARAMARK Corporation. Dkt. 10, at 2; Dkt. 13, at 3.

On February 17, 2004, plaintiffs' counsel sent a letter addressed to the following:

Lake Quinault Lodge

Risk Box 7

Quinault, WA 98575-0007

Dkt. 17, at 6. Plaintiffs' counsel requested that the letter be forwarded "to your insurance company or to the appropriate individual so that we can discuss this matter prior to litigation." *Id.*

On March 15, 2004, a letter was sent to plaintiff's counsel, as follows:

Re: Estate of Derek Xue

ARAMARK Sports & Entertainment Services, Inc.

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(ASESI)

Drowning: September 23, 2003

Claim # : CCW005330

Dear Mr. Pak:

Specialty Risk Services, LLC, administers general liability claims for ASES. They have forwarded your letter of representation of February 17, 2004, and designated this office to work with you on this matter prior to any litigation.

We look forward to working with you to resolve the estate's concerns arising out of this tragic incident.

SPECIALTY RISK SERVICES, LLC.

Jerry Stein, CPCU

Liability Supervisor

Dkt. 17, at 7.

On September 25, 2006, plaintiffs filed suit in Grays Harbor Superior Court, naming ARAMARK Corporation as the sole defendant. Dkt. 11, at 4. Although plaintiffs' attorney Hyon Pak's name is typed below a signature line, the complaint was unsigned. *Id.* at 9. The complaint was "[d]ated this 22nd day of September, 2006." *Id.* Plaintiffs contend that their counsel had sent to the Grays Harbor Superior Court the original complaint and a conformed copy of the complaint, but mistakenly signed the conformed copy instead of the original. *See* Dkt. 14, at 8-13. Accordingly, plaintiffs claim that the unsigned copy was filed in error as the original complaint, and the signed original was returned to plaintiff's counsel.

*2 On November 2, 2006, plaintiffs served CT Corporation with a summons and complaint. Dkt. 11, at 10. Plaintiff contends that CT Corporation is a registered agent for Aramark Sports & Entertainment Services, Inc. Dkt. 14, at 2. Plaintiff maintains that CT Corporation informed him that it does not ac-

cept service of process on individuals and entities that are not on its client list. *Id.* Apparently, because ARAMARK Corporation does not do business in the state of Washington, it is not on CT Corporation's client list. The complaint served on November 2, 2006 on CT Corporation differed from the complaint filed in Thurston County Superior Court in that the cause number had been typed onto the complaint, and the complaint was signed. Dkt. 11, at 13 and 18. The caption on the summons served on CT Corporation on November 2, 2006 identifies the matter as "*The Estate of Derek Xue, Jian Xiong Xue, and Ming Feng Zhong, Plaintiff v. ARAMARK Corporation, a Delaware Corporation. Defendant.*" Dkt. 11, at 11. In addition, below the typewritten name of the defendant, a notation was written as follows: "AKA Aramark Sports & Entertainment Group." *Id.*

In a declaration, Charles C. Huber, one of ARAMARK Corporation's attorneys, stated that, on November 8, 2006, he spoke with plaintiffs' counsel. Dkt. 11, at 1-2. Mr. Huber stated that, during the call, he indicated to plaintiffs' counsel that the summons that had been served on CT Corporation did not match the complaint that had been served on CT Corporation because someone had written in additional verbiage on the summons that did not appear on the complaint. Dkt. 11, at 2. Mr. Huber stated that he informed plaintiffs' counsel that the complaint that had been filed in the superior court was not signed. *Id.* Mr. Huber stated that he told plaintiffs' counsel that this seemed like irregular process and that the issue would be investigated further. *Id.*

On November 16, 2006, the case was removed to federal court under 28 U.S.C. § 1441, on the basis of diversity jurisdiction. Dkt. 1. On November 20, 2006, defendant ARAMARK Corporation filed an answer, admitting "that it operated the Lake Quinalt Lodge in Washington." Dkt. 5, at 1.

On November 21, 2006, after the case was removed to federal court, plaintiffs filed an Amended Summons and Complaint in Grays Harbor Superior

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Court. Dkt. 14, at 17-20 and Dkt. 14-2, at 1-5. The amended complaint is signed by plaintiffs' counsel. The defendant is identified as follows: ARAMARK SPORTS AND ENTERTAINMENT SERVICES, INC., a wholly owned subsidiary of ARAMARK CORPORATION. [sic] a Delaware Corporation. Dkt. 14, at 17.

MOTION FOR JUDGMENT ON THE PLEADINGS

On March 28, 2007, ARAMARK Corporation filed a motion for judgment on the pleadings, which ARAMARK stated would be treated as a motion for summary judgment because the motion is supported by declarations. Dkt. 10. ARAMARK contends that (1) the action should be dismissed because it was not properly commenced within the statute of limitations; and (2) the action should be dismissed because plaintiffs did not sue the correct entity. Dkt. 10.

*3 The motion for judgment on the pleadings was properly noted for consideration on April 20, 2007. Dkt. 10. On April 19, 2007, plaintiffs filed a late response to the motion. Dkt. 13. Plaintiffs contend that the suit was commenced within the statute of limitations period because (1) even though the complaint filed On September 25, 2006 was not signed, defendant was given a signed copy of the summons and complaint; (2) the summons and complaint filed and served were intended for the operators of Lake Quinault Lodge; any defect in the named defendant was cured when Aramark Sports and Entertainment Services Group, Inc. was served with a summons and copy of the amended complaint on November 22, 2006; and (4) Plaintiffs would have discovered the error in the name of the proper defendant if CT Corporation had not accepted service of process on behalf of Aramark Sports and Entertainment Services Group. Dkt. 13. Plaintiffs' arguments show that they are still unclear as to the name of the proper defendant, referring variously to Aramark Sports and Entertainment Services Group, Inc.; Aramark Sports and Entertainment Services Group; and Aramark Sports and Entertainment Ser-

vices, Inc. Nonetheless, plaintiffs request that the court permit plaintiffs to cure the defect in the original complaint by signing the unsigned original complaint, and by permitting plaintiffs to amend the pleadings to properly reflect the correct name of the defendant. Dkt. 13, at 5.

On April 23, 2007, defendant filed a reply. Dkt. 16. Defendant requests that the court strike plaintiffs' response because it was untimely filed. In addition, defendant contends that (1) plaintiffs' unsigned pleading, filed on September 25, 2006, is without legal effect and did not properly commence an action within the limitations period; (2) the amended complaint filed on November 21, 2006 and served on November 22, 2006 did not cure the service defects because plaintiffs did not obtain leave of court before filing an amended complaint, and because plaintiffs filed the amended complaint in state court after the case had been removed from federal court; (3) plaintiffs cannot rely on Fed.R.Civ.P. 11 to toll the statute of limitations; and (4) plaintiffs cannot rely on the relation back doctrine governed by Fed.R.Civ.P. 15(c) because plaintiffs' failure to name the proper defendant was not due to inexcusable neglect and because there was nothing to relate back to, since the original complaint was not signed. Dkt. 16.

LEGAL STANDARD

Fed.R.Civ.P. 12(c) provides as follows:

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56.

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*4 A party that has been notified that the court is considering material beyond the pleadings has received effective notice of the conversion to summary judgment. See *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1533 (9th Cir.), cert. denied, 474 U.S. 826 (1985); *Townsend v. Columbia Operations*, 667 F.2d 844, 849 (1982). Moreover, the fact that the court had before it exhibits outside the pleadings can constitute constructive notice. See *Grove*, 753 F.2d at 1533 (holding that notice is given “when a party has reason to know that the court will consider matters outside the pleadings”).

In this case, defendant stated in its motion that the motion would be treated as a motion for summary judgment. Plaintiffs filed a response to the motion. The motion is therefore considered to be a motion for summary judgment under Fed.R.Civ.P. 56.

Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt.”). See also Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir.1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Service Inc.*, 809 F.2d at 630 (relying on *Anderson*, supra). Conclusory, non specific statements in affidavits are not sufficient, and “missing facts” will not be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

DISCUSSION

*5 It is undisputed that the last day to file this civil action was three years from September 23, 2003, the date of the incident, and that, because September 23, 2006, was a Saturday, September 25, 2006, was the last day for filing suit within the limitations period. See RCW 4.16.080(2); *Nelson v. Schubert*, 98 Wn.App. 754, 758-59 (2000); Washington CR 6(a). The unsigned complaint was filed in Grays Harbor Superior Court on September 25, 2006.

1. Unsigned Complaint. Defendant claims that the action was not properly commenced against any defendant within the statute of limitations period because the complaint was unsigned. Accordingly, defendant contends that the case should be dismissed as barred by the statute of limitations. Plaintiffs request that they be permitted to file an amended complaint that includes the proper verification.

Under Washington CR 15(a), a party may amend a pleading once at any time before a responsive pleading is served; thereafter, a pleading may be amended only by leave of the court or by written

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consent from the adverse party. Leave to amend must be freely given when justice so requires, unless the amendment would result in prejudice to the nonmoving party. Washington CR 15(a); *Kirkham v. Smith*, 106 Wn.App. 177, 181 (2001). Because a motion to amend the pleadings would now be considered to have been filed after the statute of limitations had run, any amended pleading allowed would be untimely unless it related back to the date of the original pleading. Washington CR 15(c).

The rules regarding amendment of pleadings serve to facilitate proper decisions on the merits, to provide parties with adequate notice of the basis for claims and defenses asserted against them, and to allow amendment of the pleadings except where amendment would result in prejudice to the opposing party. *Caruso v. Local Union No. 690*, 100 Wash.2d 343, 349,(1983); *Herron v. Tribune Publ'g Co.*, 108 Wash.2d 162, 165 (1987). In determining whether an amendment would cause prejudice, the court should consider undue delay, unfair surprise, the introduction of remote issues, and possible jury confusion. *Wilson v. Horsley*, 137 Wn.2d 500, 505-06 (1999); *Kirkham v. Smith*, 106 Wn.App. at 181.

Washington does not treat inadequate pleadings as defects depriving the court of jurisdiction. See *Greene v. Union Pac. Stages*, 182 Wn.143 (1935)(while motion to strike is proper when complaint is not verified, defectively verified complaint can be amended at trial, since defective verification does not affect merits); *Beal v. City of Seattle*, 134 Wn.2d 769, 783 (1998) (change in representative capacity of person bringing suit relates back to original filing, regardless of whether original failure to name proper plaintiff arose from inexcusable neglect, provided there is no prejudice to defendant). See also *Lind v. Frick*, 15 Wn.App. 614, 617 (1976)(“Modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.”). See also *Board of Trustees of the Leland Stanford Junior University v. Superior Court of Santa Clara County*,

2007 WL 1139455, *5 (Cal.App. 6 Dist.)(signature defect is an irregularity rather than a nullity, and may be cured by amendment).

*6 This approach is also consistent with Washington civil rules of procedure. Washington CR 7(a) recognizes that a “complaint” is a “pleading.” Washington CR 11(a) provides that “[i]f a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant.” The Washington rule is in accord with Fed.R.Civ.P. 11(a), which provides that “[a]n unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.”

Although the complaint in this case was unsigned when it was filed on September 25, 2006, plaintiffs did attempt to correct this deficiency, after counsel was informed on November 8, 2006 that the complaint was unsigned, by filing a signed amended complaint on November 21, 2006. That amended complaint was filed in Grays Harbor Superior Court after the case had been removed to federal court. Now, apparently recognizing that the original complaint was unsigned, and also apparently recognizing that the attempt to file an amended complaint in state court after the case had been removed to federal court did not comply with proper procedure, plaintiffs have requested that they be permitted to file an amended complaint that is properly verified. The signature on the complaint is a technical defect, and plaintiffs should be permitted to correct the defect by filing a signed amended complaint.

2. Service on ARAMARK Corporation Within Limitations Period. Defendant argues that plaintiffs did not properly serve the summons and complaint within the time period set forth in RCW 4.16.170 for tolling a statute of limitations.

In Washington, the statute of limitations for tort claims is three years. RCW 4.16.080(2). If a complaint is filed before the summons is served, the action is deemed to have commenced the day the

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complaint is filed. RCW 4.16.170. In such situations, a plaintiff must serve the summons within 90 days of the filing of the complaint. *Id.* If the plaintiff fails to do so, “the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.” *Id.*

In this case, assuming that the complaint was properly filed, the action was commenced on September 25, 2006. Pursuant to RCW 4.16.170, plaintiff had ninety days after filing the complaint to properly serve the summons and complaint. Defendant argues that plaintiff did not properly serve the summons and complaint on the correct defendant (because ARAMARK Corporation was not the correct defendant) within ninety days of filing the complaint.

The complaint served on CT Corporation on November 2, 2006 was not identical to the complaint filed on September 25, 2006, because the case number on the November 2, 2006 document had been typed in and the complaint was signed. The signature on the complaint served on CT Corporation on November 2, 2006, does not appear to match the signature on the “conformed copy” that plaintiff maintains he intended to file as the original on September 25, 2006. See Dkt. 14, at 13, and Dkt. 11, at 18. It appears that the complaint served on CT Corporation on November 2, 2006 was not identical to the complaint filed in Grays Harbor Superior Court on September 25, 2006. The discrepancies, however, appear to relate more to form (typed case number and signature) than the substance of the complaint.

*7 Neither the complaint nor the summons served with the complaint on November 2, 2006, named as defendant Aramark Sports & Entertainment Services, Inc., which ARAMARK Corporation maintains would be the proper defendant. The record is confusing as to the relationship of ARAMARK Corporation, Aramark Sports & Entertainment Services, Inc., and Aramark Sports and Entertainment Group, and whether service of the original complaint was proper. CT Corporation is authorized to

accept service of process, apparently on behalf of Aramark Sports & Entertainment Services, Inc., but not on behalf of ARAMARK Corporation. CT Corporation apparently accepted service of process of the complaint on November 2, 2006. That summons and complaint was apparently received by some entity and then forwarded to Mr. Huber, who is one of ARAMARK Corporation's attorneys; Mr. Huber does not indicate what relationship he, as one of ARAMARK Corporation's attorneys, has with Aramark Sports & Entertainment Services, Inc., or with Aramark Sports and Entertainment Group. It is curious that the named defendant, ARAMARK Corporation, requests that the court dismiss the claims against “Any Defendant” as barred by the statute of limitations; it is unclear whether Mr. Huber represents ARAMARK Corporation alone, and/or whether he represents Aramark Sports & Entertainment Services, Inc., and/or whether he represents Aramark Sports and Entertainment Group. Mr. Reitmeyer stated that he is the Vice President and Associate General Counsel for Risk Management, Antitrust and Litigation in “the Aramark Legal Department”; it is unclear what the relationship of ARAMARK Corporation, Aramark Sports & Entertainment Services, Inc., Aramark Sports and Entertainment Group, and Aramark Legal Department is, at least for the purposes of service of process. To complicate matters further, in the answer to the complaint, ARAMARK Corporation admitted that it operates Lake Quinault Lodge.

Based upon the record before the court, defendant has not shown that service of the summons and complaint on November 2, 2006 was inadequate, at least as to ARAMARK Corporation. Accordingly, on the record before the court, it appears that plaintiffs served the complaint within the 90 day period authorized by RCW 4.16.170.

3. Amendment of Complaint to name Aramark Sports & Entertainment Services, Inc. as Defendant. Plaintiffs submitted documents that, on November, 21, 2006, they filed a signed amended complaint in Grays Harbor Superior Court, naming

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“ARAMARK SPORTS AND ENTERTAINMENT SERVICES, INC., a wholly owned subsidiary of ARAMARK CORPORATION, a Delaware Corporation” as the defendant. Dkt. 14, at 17. The record shows that, on November 22, 2006, the summons and amended complaint were served on Aramark Sports and Entertainment Services Group (Dkt. 14, at 4) and ARAMARK Sports and Entertainment Group, Inc. (Dkt. 14-2, at 5); neither of these entities is named in the caption of the amended complaint. The summons and the amended complaint were filed within ninety days from the date of filing the original complaint on September 25, 2006. They were not, however, filed in the proper court. By the time plaintiffs filed their amended complaint on November 21, 2006, the case had been removed to federal court. The amended complaint has not been properly filed in this court. Further, because an answer has been filed, plaintiffs would require leave of the court to file an amended complaint.

*8 In their response to ARAMARK Corporation's motion for judgment on the pleadings, plaintiffs request that the court permit them to file an amended complaint, naming the proper defendant.

Defendant maintains that, if the court were to permit plaintiffs to file an amended complaint naming Aramark Sports & Entertainment Services, Inc., it would be prejudiced because it has not had the opportunity to conduct discovery regarding the purported service of the amended summons and amended complaint on November 22, 2007. Moreover, defendant contends that the error in naming the defendant was due to inexcusable neglect, since the name of the operator of Lake Quinault Lodge was easily obtainable through public records, and in fact, plaintiffs had the name of the proper defendant as early as March 15, 2004, when plaintiffs' counsel received the letter from Specialty Risk Services LLC.

An amended complaint will be barred by the statute of limitations unless it “relates back” to the original complaint's filing date. Fed.R.Civ.P. 15(c)(3) allows the date of an amended complaint to “relate

back” to the date of the original complaint's filing date if four prerequisites are met.; *Schiavone v. Fortune*, 477 U.S. 21, 29 (1986); see also *Wilke v. Bob's Route 53 Shell Station*, 36 F.Supp.2d 1068, 1072 (N.D.Ill.1999); *Worthington v. Wilson*, 8 F.3d 1253, 1255-56 (7th Cir.1993). An amendment changing or adding a party will relate back if (1) the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set out in the original pleading; (2) within the statute of limitations, the party added in the amendment received notice of the action and will not be prejudiced in maintaining a defense; and (3) within the statute of limitations, the party added knew or should have known that, but for a mistake, the action would have been brought against him or her. See Fed.R.Civ.P. 15(c)(2) and (3), and Washington CR 15(c). Washington courts have added another requirement when a plaintiff attempts to add a defendant by amendment: the moving party must also show that its failure to name the party was by excusable neglect. *Bunko v. City of Puyallup Civil Serv. Comm'n*, 95 Wn.App. 495, 500, 975 P.2d 1055 (1999) (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 174, 744 P.2d 1032, 750 P.2d 254 (1987)). Generally, Washington courts have applied inexcusable neglect as a bar to Washington CR 15(c) amendments only in those cases where the plaintiff seeks to join additional defendants. See *Nepstad v. Beasley*, 77 Wn.App. 459, 467(1995). When a plaintiff seeks a substitution to correct the mistaken identity of the defendant, inexcusable neglect should not work as an absolute bar to amendment. *Id.* at 467-68. However, because the decision to grant or deny a Washington CR 15(c) motion to amend is discretionary, the court may consider inexcusable neglect as an appropriate factor in such a case. *Id.* at 468.

*9 The purpose of Washington CR 15(c) is to allow amendment of the pleadings provided the defendant has notice and is not prejudiced. *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 782 (1998). See *DeSantis v. Angelo Merlino & Sons, Inc.*, 71 Wn.2d 222, 224 (1967) (amendment to change the name of

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the defendant from a proprietorship to a corporation was proper); *Craig v. Ludy*, 95 Wn.App. 715 (1999)(amendment substituting estate as defendant related back to date of filing complaint). See also *Ingram v. Kumar*, 585 F.2d 566, 570-71 (2d Cir.1978) (amendment based on a misnomer should be allowed if the defendants knew about the claim and that the plaintiff intended to assert it against them); *Rylewicz v. Beaton Services, Ltd.*, 698 F.Supp. 1391, 1399 (N.D.Ill.1988) (relation back generally allowed to correct a misnomer, e.g., when a partnership is erroneously sued as a corporation), *aff'd*, 888 F.2d 1175 (7th Cir.1989)

The court recognizes that, throughout these proceedings, plaintiffs have consistently been imprecise in naming the defendant(s) they wish to sue. In this case, because there are apparently at least three entities that have been referred to by plaintiffs, and because the names of the different entities are similar, the record is confusing.

It appears from the record that plaintiff intends to file in this removal action the amended complaint he filed in state court on November 21, 2006, and that has been attached to plaintiffs' counsel's declaration as Exhibit B. Dkt. 14, at 17-20, and Dkt. 14-2, at 3. The amended complaint involves claims that arose out of the conduct, transaction, or occurrence set out in the original complaint filed in state court on September 25, 2006. To the extent the court can determine, Aramark Sports & Entertainment Services, Inc. received notice of the action on November 2, 2006 and/or November 22, 2006, within the statute of limitations period. Aramark Sports & Entertainment Services, Inc. should not be prejudiced in maintaining a defense, since this action is at the early stage of proceedings. To the extent that the court can determine, Aramark Sports & Entertainment Services, Inc. was aware within the statute of limitations that, but for plaintiffs' error in the name of the defendant, the action would have been brought against it; at least, this entity has not stated that it was unaware of the action. While it appears now, from the public record and from the letter sent

to plaintiff by Specialty Risk Services, LLC, on March 15, 2004, that the proper defendant in this case should be Aramark Sports & Entertainment Services, Inc., there was at least some confusion as to the identity of the proper defendant. CT Corporation apparently accepted service of the complaint, which named ARAMARK Corporation as the defendant, on November 2, 2006. CT apparently accepted service of the amended complaint on November 22, 2006, when the summons and complaint had varying names in the caption. There was, therefore, at least some excusable neglect on the part of plaintiffs with regard to the naming of the proper defendant. This is not to condone plaintiffs' imprecise and confusing mixing up of names of the several entities that have been referred to throughout these proceedings. The court should permit plaintiffs to file an amended complaint, naming the proper defendant(s).

***10** The court recognizes that Aramark Sports & Entertainment Services, Inc. has neither been named nor appeared in this matter. Should plaintiffs file an appropriate signed amended complaint, naming Aramark Sports & Entertainment Services, Inc., this defendant is not precluded from raising the statute of limitations issue, or any other legal issues, on its own behalf.

4. Compliance With Procedural Rules. The court notes that plaintiffs' counsel does not appear to be familiar with the procedural rules that govern these proceedings. The response to defendant's motion was not timely filed, as is required by Local Rule CR 7. Moreover, the response includes an attempt to change the caption of the case to reflect a defendant other than the named defendant. No motion has been made to amend the caption. Plaintiffs' counsel is hereby **NOTIFIED** that failure to comply in the future with the Federal Rules of Civil Procedure and/or the Local Rules for the Western District of Washington may result in sanctions under Local Rule GR 3; sanctions may include monetary sanctions and/or dismissal of the case.

Defendant requests that the court strike plaintiffs'

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untimely response. Dkt. 16. It does not appear that defendant has been prejudiced by the late reply. Furthermore, the court expects plaintiffs to comply with the procedural rules in the future. The motion to strike should be denied.

Therefore, it is hereby **ORDERED** that Defendant ARAMARK Corp.'s Motion for Judgment on the Pleadings (Dkt.10) is **DENIED**. Defendant's motion to strike plaintiffs' response (Dkt.16) is **DENIED**. Not later than May 11, 2007, plaintiffs are **ORDERED** to file an amended complaint, properly verified, naming the defendant or defendants plaintiffs are suing. If plaintiffs fail to comply with this order, the court will dismiss this case.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

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